Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

77-294

NO. 77-924

ABRAHAM THOMAS OLIVA,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported as Oliva v. State, 346 So. 2d 1066 (Fla. 3d DCA 1977), and is printed in the petitioner's Appendix at A. 1-5.

QUESTIONS PRESENTED

The respondent respectfully rephrases the petitioner's Questions Presented as follows:

I and II

WHETHER THERE EXISTS AN ADEQUATE AND INDEPENDENT STATE GROUND SUFFICIENT TO PRECLUDE REVIEW BY THIS COURT OF THE ISSUE RAISED BY THE ALLEGED INTRODUCTION BY THE STATE OF TESTIMONY OF A PRIOR TRANSACTION (QUESTION I) AND BY THE DENIAL OF A DEFENSE MOTION FOR MISTRIAL MADE ON THE BASIS OF ALLEGEDLY IMPROPER PROSECUTORIAL ARGUMENT TO THE JURY (QUESTION II)?

III

WHETHER A REAL AND SUBSTANTIAL FEDERAL QUESTION, AS DISTINGUISHED FROM ONE DEVOID OF MERIT, FRIVOLOUS OR ABSTRACT, HAS BEEN PRESENTED BY THE COURT'S ALLEGEDLY UNDULY RESTRICTING CROSS EXAMINATION OF A STATE'S WITNESS?

STATEMENT OF THE FACTS

The respondent accepts the petitioner's Statement of the Facts as being substantially true and correct, but deems the following additional facts to be relevant to this Court's determination on the question of jurisdiction:

Before commencing his cross examination of State's witness, Arthur Moore, defense counsel asked the court if he could go into all the pending charges against Mr. Moore. The court replied:

> I will permit you to ask him if there are any pending charges against him. I will let him answer that question and if he

> says he doesn't know I am not going to permit further examination. I am making the same ruling I made before. (TR.49)

During the cross examination of Moore the following questions were asked and the following responses were elicited:

> Q. [By Defense Counsel] Are there any charges pending against you now?
>
> A. Not to my knowledge.
>
> Q. Were any charges dropped against you in return for your work for the Florida Department of Criminal Law Enforcement?
>
> A. There was but it was not for no work. Not for what I was doing on this behalf.
>
> Q. Why were they dropped then? What was the reason, if you know?
>
> A. I don't know. You would have to see them.
>
> Q. Who is them?
>
> A. Well, Chappell on the 3rd Floor and Les Garringer and

Rand Winter.

Q. Would you identify who Chappell is?

A. Judge Bill Chappell.

Q. Would you identify Les Garringer?

A. Assistant State Attorney.

Q. They are the ones that dropped the charges against you?

A. They nolle prossed them.

Q. That means they were dismissed or dropped?

A. Yeah.

Q. You say not to your knowledge was it in return for any work but out of the clear blue they dropped the charges.

A. Yeah.

[Defense Counsel]: Your honor, in light of the Court's earlier ruling, I will not pursue this line of questioning then. (TR. 55,56)

ARGUMENT

I and II

At the outset, the respondent would note that the petitioner has failed to cite even one federal decision in support of his argument in Question I that the issue raised by the alleged introduction by the State of testimony of a prior transaction warrants the exercise of this Court's jurisdiction. Similarly, the petitioner has failed to cite even one federal authority in support of his claim in Question II that the issue raised by allegedly improper prosecutorial argument warrants review by this Court. (See Reasons for Granting Writ in Petitioner's Brief, at 16-27)

This Court has adhered to the principle that it will not review judgments of state courts which rest upon adequate and independent state (or nonfederal) grounds, and many decisions evidence this Court's intention to scrupulously observe this long standing rule. See Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Holly v. Lawrence, 317 U.S. 518 (1943); McGoldrick v. Gulf Oil Corp., 309 U.S. 2 (1940); Kalb v. Feuerstein, 308 U.S. 433 (1943). That is, a review is precluded if the decision of the state court is upon a nonfederal ground or a point of local or general law sufficient to support the judgment, or where the question is one of

state practice or remedy. Henry v. Mississippi, 379 U.S. 443 (1965); Herb v. Pitcairn, supra; United Gas Public Service Co. v. Texas, 303 U.S. 123 (1938); Kammerer v. Kroeger, 299 U.S. 302 (1937). Before this Court will entertain jurisdiction to review a judgment of a state court, it must affirmatively appear from the record not only that a real and substantial federal question was involved, but that the decision of the state court on the federal question was necessary to its determination of the cause. Black v. Cutter Laboratories, 351 U.S. 292 (1956); Durley v. Mayo, 351 U.S. 277 (1956); Wilson v. Cook, 327 U.S. 474 (1946). Stated differently, even where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, this Court is without jurisdiction to review if the non-federal ground is independent of the federal ground and is adequate to support the judgment. Jankovich v. Indiana Toll Road Com., 379 U.S. 497 (1956); Fay v. Noia, 372 U.S. 391 (1963); Cramp v. Board of Public Instruction, 368 U.S. 278 (1962); Black v. Cutter Laboratories, supra; Durley v. Mayo, supra. The policy behind these principles was clearly stated Herb v. Pitcairn, supra, at 125-126:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Citations omitted.] The reason is so obvious that it has

> rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. [Emphasis supplied.]

In Lynch v. New York, 293 U.S. 52, (1934), this Court explained:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered

could not have been given without deciding it.

With regard to the issue that the trial court erroneously allowed the "introduction" of testimony of a prior transaction, it is evident that the decision below rests on adequate and independent state grounds, and that no federal question is involved. In rejecting the petitioner's contention on this issue, the court below set forth the pertinent facts appearing in the record and then ruled:

> The cross examination of the defendant and the subsequent rebuttal by the State was proper under the rule stated in Dabney v. State, 119 Fla. 341, 161 So. 380 (1935); and Fla. R. Crim. P. 3.250. See also rule in Matera v. State, 218 So. 2d 180 (Fla. 3d DCA 1969).
>
> Oliva v. State, supra, 324 So.2d at 1068.

The court below therefore based its decision upon a Florida rule of criminal procedure and case law which delineate the proper confines of cross examination and impeachment of the accused's testimony when he chooses to take the stand in his own behalf. See Fla. R. Crim. P. 3.250; Dabney v. State, 119 Fla. 341, 161 So. 3380 (1935). Rule 3.250 states in essence that when the accused becomes a witness in his own behalf, he is subject to cross examination as any other witness (provided,

of course, that his Fifth Amendment rights are protected). See Fla. R. Crim. P. 3.250. In Dabney v. State, supra, the Florida Supreme Court specifically stated the principle that

> ...if a defendant voluntarily takes the stand and testifies as a witness in his own behalf, then he becomes subject to cross-examination as any other witness and the prosecuting officer has the right to comment on his testimony, his manner and demeanor on the stand, the reasonableness or unreasonableness of his statements, and on the discrepancies which may appear in his testimony to the same extent as would be proper with reference to testimony of any other witness.
>
> Dabney v. State, supra, 161 So. at 381.

As reflected by the opinion itself, the petitioner in the present case untruthfully first testified that he had never before the September 5th meeting seen State's witness, Debbie Young. (TR 89, 90) Further, the petitioner testified under oath that he had never given cocaine to Debbie Young, as evidenced by the following excerpt from the record:

> Q. Did you hear Debbie Young testify today?

A. Yes.

Q. What she testified to is not true?

A. That I gave her cocaine?

Q. Yes.

A. That is wrong. I never gave that woman none. (TR. 89)

Further, the petitioner had also denied ever having bought anything of value from Arthur Moore (the confidential informant who accompanied Debbie Young) before the September 5th meeting, except for a gold chain which Moore offered to sell him on a prior occasion. That testimony was as follows:

Q. What did (Arthur Moore) he tell you?

A. He said to meet him over there at noon, that he wanted to show me something you might be interested in buying. (TR. 84)

* * * *

Q. You didn't ask him what it was?

A. He said he had something of value that I might be interested in buying.

Q. Have you ever bought things from him before?

A. No, I haven't.

Q. You never have?

A. No.

Q. This was the first time he offered to sell you anything?

A. No, it wasn't the first time.

Q. What else had he ever offered to sell you?

A. He offered to sell me a gold chain about six months ago, before this. (TR. 85)

Hence, based upon Florida rules governing the scope of impeachment of the accused's testimony as a test of his credibility, the court below ruled that the State could properly question the petitioner as to the nature of the August 20th meeting to bear on the credibility of his testimony at trial and on the believability of his version of the events, the petitioner having testified that he never gave cocaine to Officer Young. Oliva v. State, supra, 346 So.2d at 1067, 1068. It is clear therefore that the decision below rests on an adequate and independent state ground and that no federal issue of any sort is involved.

Moreover (as if this were not sufficiently convincing), the court below rested its decision upon an alternative state ground. Immediately following the ruling quoted above, the court below stated:

> Even if the cross-examination of the defendant and subsequent rebuttal testimony should be held to be within the scope of the "other crimes" rule set forth in Williams v. State, 110 So.2d 654 (Fla.1959), the evidence would meet the test of the Williams rule because the evidence showed a method of operation which was the same as that employed in the sale with which defendant was charged. Cf. Crespo v. State, 344 So.2d 598 (Fla.3d DCA 1977), case no. 76-634, released April 5, 1977. (Footnote omitted)
>
> Oliva v. State, supra, 346 So.2d at 1068.

In the landmark case of Williams v. State, 110 So. 2d 654, 663, (Fla. 1959), the Florida Supreme Court announced the rule of admissibility in Florida relative to evidence tending to reveal other crimes. In that case, the court held that such evidence is admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern

of criminality so that the evidence of the prior offenses would have a relevant or a material bearing on some essential aspect of the offense being tried. Williams v. State, supra, 110 So.2d at 662. Hence, it is evident that even the alternate ground for decision constitutes an independant state ground and in no fashion is an issue of a federal nature involved. This Court is thus without jurisdiction to review a state court judgment which squarely rests upon a nonfederal ground. See, e.g., Henry v. Mississippi, supra; Herb v. Pitcairn, supra; Black v. Cutter Laboratories, supra (and other cases cited).

Similarly, with regard to the issue that the trial court erroneously denied petitioner's counsel's motion for mistrial made on the basis of allegedly improper prosecutorial argument to the jury, the decision below rests on an adequate and independent state ground which is sufficient to support the judgment, and no federal issue is necessarily involved. In rejecting the petitioner's contention on this issue, the court below first recognized the impropriety of the prosecutor's comment because it was not a comment upon the evidence before the jury, but then proceeded to phrase the issue before it as follows:

> Was the remark so prejudicial as to constitute the denial of the motion for mistrial reversible error?
>
> Oliva v. State, supra, 346 So.2d at 1068.

In ruling that the remark was not of such nature so as to warrant the declaration of a mistrial, the court below expressly rested its holding upon the Florida Supreme Court decision in Johnsen v. State, 332 So.2d 69 (Fla. 1976), and upon its own decision in Wingate v. State, 232 So.2d 44 (Fla. 3d DCA 1970). Bearing in mind that the issue was phrased by the court below as whether the remark called for the remedy of declaring a mistrial, it must be noted that in both the Johnsen and Wingate cases (on which the court below relied) the Florida courts set forth in detail the general rules in Florida governing the circumstances which necessitate the declaration of a mistrial. For instance, in Johnsen v. State, supra, the Florida Supreme Court quoted from the Florida harmless error statute and announced:

> The granting of a mistrial should be only for a specified fundamental or prejudicial error which has been committed in the trial of such a nature as will vitiate the result. (Citations Omitted)
>
> When such a fundamental or prejudicial error has been committed as will necessitate the granting of a new trial later, it is within the province of the trial judge, upon proper motion, to grant a mistrial at that point. However, when an alleged error is committed which does no substantial harm and the defendant

> is not materially prejudiced by the occurrence, the court should deny the motion for a mistrial. See Daugherty v. State, 143 Fla. 578, 197 So. 501, certiorari denied, [311 U.S. 648] 61 S.Ct. 44, 85 L.Ed. 414. The granting of a mistrial effectively stops the proceedings when fundamental or prejudicial error has been committed, to save the time and expense of further procedure in the trial; but a mistrial should not be granted when the error committed is not prejudicial to the substantial rights of the defendant.
>
> * * * *
>
> The objectionable remarks made by the prosecutor sub judice were not so prejudicial that no cautionary curative instructions give by the trial judge could negate their harmful effect. (Emphasis Supplied)
>
> Johnsen v. State, supra, 332 So.2d 71, 72.

Likewise, in Wingate v. State, supra, the Florida court had reasoned:

> Finally, the appellant contends that certain remarks by the prosecutor during closing argument were so highly prejudicial that the trial judge

should have granted a mistrial upon the motion of defense counsel. We cannot agree. As was stated in the case of Spencer v. State, Fla.1961, 133 So.2d 729, "The rule is that considerable latitude is allowed in arguments on the merits of the case."

* * * *

The trial judge, too, is afforded great latitude in his discretion to grant or deny a motion for mistrial. Eg., Furr v. State, 152 Fla. 233, 9 So.2d 801 (1942). In the case sub judice, the objectional comment was weighed by the trial judge as he determined whether the jury would be so prejudiced by the argument as to render a verdict different from one properly supported by the evidence and presentation of counsel. This determination was made by the trial judge from a position of experience and intimacy with the case which cannot be duplicated by any other tribunal. Eg., Bertone v. State, Fla. App. 1969, 224 So.2d 400. Thus, although the judge found the argument objectionable and sustained counsel's objection thereto, he did not feel that this small portion of argument recited by the prosecuting attor-

ney in her closing rebuttal statement to the jury was so inflammable and prejudicial as to require a mistrial. We are compelled to sustain the decision of the trial judge for the reasons expressed above. (Emphasis Supplied)

Wingate v. State, supra, 232 So.2d at 45, 46.

Hence, based upon the Florida rules delineating the circumstances which necessitate the declaration of a mistrial in the midst of a criminal trial, the court below ruled that the trial court had not committed error in denying such motion. As such, the decision below rests upon an adequate and independent state ground for decision which is sufficient to support the judgment, and no federal issue is necessarily involved in this ruling. In this regard, it must be remembered that this Court will not review state court decisions which rest upon a nonfederal ground or a point of local or general law sufficient to support the judgment, or where the question is one of state practice or remedy. Henry v. Mississippi, supra; Herb v. Pitcairn, supra; United Gas Public Service Co. v. Texas, supra; Kammerer v. Koreger, supra. Before this Court will entertain jurisdiction to review a state court judgment, it must affirmatively appear from the record not only that a real and substantial federal question was involved, but that the decision of the state court on the federal question was necessary to its

determination of the cause. Black v. Cutter Laboratories, supra; Durley v. Mayo, supra; Wilson v. Cook, supra. And even in cases where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, this Court is without jurisdiction to review the judgment if the nonfederal ground is independent of the federal ground and is adequate to support the judgment. Jankovich v. Indiana Toll Road Com., supra; Cramp v. Board of Public Instruction, supra; Black v. Cutter Laboratories, supra; Durley v. Mayo, supra. In short, this Court will not entertain jurisdiction to review a state court decision, even though such decision is based upon both federal and state grounds, where the state ground is sufficient basis for the judgment rendered. Id.

The respondent submits that such in the case here. It is evident that the decision below does not involve a real and substantial federal question on the issue of the prosecutor's remark, and it is just as clear that no ruling on a federal question was necessary to determine the cause in this regard. Rather, the decision below may properly rest upon a state ground or rules which are completely independent of any federal ground, and which are amply sufficient basis to support the judgment rendered. Thus, no basis for jurisdiction is present.

III.

This Court has held that before it will entertain jurisdiction to review a judgment of a state court, it must affirmatively appear from the record that a real and substantial federal question, as distinquished from one devoid of merit or frivolous, was involved in the decision below. California Water Service Co. v. Redding, 304 U.S. 252 (1938); Valley S.S. Co. v. Wattawa, 244 U.S. 202 (1918); St. Louis & S.F. R. Co. v. Shepherd, 240 U.S. 240 (1917). This Court will not assume jurisdiction to review a state judgment where the asserted federal right is so wanting in foundation and so unsubstantial as to be devoid of all merit and frivolous, California Water Service Co. v. Redding, supra, Valley S.S. Co. v. Wattawa, supra, St. Louis & S.F.R. Co. v. Shepherd, supra, or where it is at most conjectural whether the party will be deprived of any constitutional right. Abrams v. Van Schaick, 293 U.S. 188 (1935). The mere averment of a federal question or some claim of constitutional right is not sufficient unless it can be shown that the question is a real one, and that there is a real and substantial controversy which deserves serious consideration. United States Fidelity & G. Co. v. Oklahoma, 250 U.S. 11 (1920); Sawyer v. Piper, 189 U.S. 154 (1902). Hence, although a question of federal law may be raised, review by this Court will not be warranted if it appears that the question is so absolutely devoid of merit as to be

frivolous, or has been explicitly foreclosed by a decision or decisions of this Court so as to leave no room for real controversy. Zucht v. King, 260 U.S. 174 (1922); Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902). This Court's limited reviewing power should therefore not be utilized to supervise adherence to its previous rulings on a factual, case-by-case basis. See Rice v. Sioux City Cemetery, 349 U.S. 70 (1955).

The petitioner in the present case has not presented a "substantial" federal question. Indeed, the issue presented by the petitioner is not only unsubstantial, but it has been foreclosed by prior decisions of this Court and leaves no room for real controversy.

Initially, the respondent takes issue with the petitioner's assertion that the credibility of State's witness Arthur Moore "was the foundation of the State's case." (See Reasons for Granting Writ in Petitioner's Brief, at 28) Indeed, State's witness Deborah Young was the police officer who purchased the narcotics from the petitioner while Arthur Moore was present. Ms. Young, the first witness for the prosecution, testified in detail as to the transaction she consummated with the petitioner. (TR. 10-36) In addition, Special Agent George D'Allessandro, who took photographs of the individuals involved during the transaction from a nearby location (TR 63), corroborated Young's and Moore's testimony to the extent to which he was able to observe the transaction from a distance.

(TR 83-68) Hence, the credibility of State's witness Arthur Moore, who was not the only witness to the transaction, cannot be so accurately described as "the foundation of the State's case."

Additionally, in Smith v. Illinois, 390 U.S. 129 (1968) and Alford v. United States, 282 U.S. 687 (1931), this Court was confronted with the same or similar claim as made by the petitioner herein. In Smith v. Illinois, supra, however, the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived although the witness admitted that the name he had first given was false. Quoting from Alford v. United States, supra, this Court expressed the following principles in holding that the petitioner had been deprived of his right of confrontation:

> Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . .
>
> The question, 'Where do you live?' . . . was an essential step in identifying the witness with his environment, to which cross-examination may always be directed.
>
> Smith v. Illinois, supra, quoting from Alford v. United States, supra, 282 U.S. at 692-694.

In addition to the fact that this Court's limited reviewing power should not be utilized to supervise the adherence to its previous rulings on a factual, case-by-case basis, it is evident that the court below adhered to the principles expressed in Smith v. Illinois, supra, and Alford v. United States, supra, and a substantial federal question that requires the exercise of this Court's jurisdiction has thus not been presented. The court below held in the present case held that the petitioner's claim of error arising from the non-disclosure during testimony of the present address of the informer witness had been disposed of adversely to him in its prior decision in Crespo v. State, 344 So.2d 598 (Fla. 3d DCA 1977). In Crespo, the court had expressly relied on Smith v. Illinois, supra, in rejecting the same contention against a similarly situated defendant. Specifically, the court stated in Crespo:

> Arthur Moore, a confidential informant, was a key witness for the prosecution. The ruling related only to his present address. Here the withholding of the present address of the witness Moore was not without some basis therefor in the interest of the witness and the State. Those factors may not have been of the kind sufficient to have justified the ruling, if disclosure of Moore's address had been essential in order for him to be properly placed in his environment. However, in this instance revelation of the then present address of the witness was not needed for that purpose. The defendant Crespo had known the witness Moore in Key West for seven or eight years. Moore and the defendant Ortega had lived and grown up together in the community of Key West, in which the trial was held. Thus, without his present address disclosed, the witness was sufficiently placed in his environment for the purpose of cross-examination, and as his environment might avail the jury in weighing his general credibility. (Emphasis added)
>
> Crespo v. State, supra, 344 So.2d at 599.

Thus, Crespo, which expressly adhered to Smith v. Illinois, supra, was the basis for the Court's disposition of the present issue. Hence, even if a federal question has been presented, it is devoid of merit and has been explicitly foreclosed by a prior decision of this Court so as to leave no room for real controversy. See Smith v. Illinois, supra, Alford v. United States, supra. Review by this Court is therefore not warranted. Zuch v. King, supra; Equitable Life Assurance Society v. Brown, supra.

The record in the instant case reveals that the petitioner on cross examination was able to place the witness Arthur

Moore in his environment and elicited testimony concerning the witness' record and background. (TR. 51-55) Arthur Moore had previously appeared on behalf of the State of Florida at several trials in Key West arising out of similar drug charges (TR. 48, 49), at which trials Moore had apparently given testimony against similarly situated defendants. At the time of the present trial, Moore was still in the employ of the Florida Department of Criminal Law Enforcement, for which he had been working for a period of a year and a half prior to trial. (TR. 37, 51) Moreover, the record reveals that there was no lack of knowledge on the part of the defendant as to the background of the witness. (TR. 51-55) Thus, the effect of the disclosure of the particular fact of Moore's address during cross examination would have been minimal since the petitioner was still able to place the witness in his proper setting during cross examination. See Smith v. Illinois, supra; Alford v. United States, supra. This effect must also be viewed in light of the fact that allowing such questioning would have tended to endanger the personal safety of the witness and might also have hampered him in the continuation of his activities, thus serving State and public interest. See, for example, United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973); United States v. Crockett,506 F.2d 759 (5th Cir. 1975).

In United States v. Smaldone, supra, the federal court held that where there was no lack of knowledge on the part of

the defendant as to the background of the witness, and defense counsel made no showing as to why he needed the witness' address, the witness did not have to disclose his address. Likewise, in United States v. LaBarbera, 463 F.2d 988 (7th Cir. 1972), the federal court held that the witness' present address did not have to be revealed on cross examination because:

> The record shows that Barr's testimony was the subject of extensive cross-examination by the defendants; although this is not dispositive of the issue raised on appeal, it does suggest that any prejudice to defendants was minimal. The disability inherent in the trial court's ruling was clearly outweighed by the necessity of protecting the witness Barr.
>
> United States v. Barbera, supra, 463 F.2d at 990.

Further, in United States v. Crockett, 506 F.2d 759 (5th Cir. 1975), the Fifth Circuit Court of Appeals, after citing Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), and Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968), held

> the case in which a witness might be in physical danger to be an exception to the preference for disclosure.
>
> United States v. Crockett, supra, 506 F.2d at 762.

In United States v. Crockett, supra, the court noted that the defendants had demonstrated no prejudice since they were able to place the witnesses in their environment. The same is true of the case at bar. The petitioner has not demonstrated prejudice. Moore was placed in his environment during testimony.

Other federal court of appeals decisions have also denied to the accused disclosure of an informant's address when the witness could be placed in his environment or a threat to his safety existed. See, e.g., United States v. Ellis, 468 F.2d 638 (9th Cir. 1972); United States v. La Barbera, 463 F.2d 988 (7th Cir. 1972). In the instant case, where the petitioner's thorough and extensive cross examination was able to place the witness in his environment, where the witness's past and present employment as an informant indicated a threat to his safety if his address was disclosed, and where the record does not disclose that any prejudice accrued to the petitioner from not being allowed to question Moore as to his present address, the trial court was well within its discretion in denying petitioner's request that he be allowed to elicit such specific testimony from Moore. Thus, even if a federal question has been presented, such question is unsubstantial and devoid of merit, and has been foreclosed by prior decisions of this Court so that no real and substantial controversy which deserves serious consideration is present herein. This Court's exercise of jurisdiction is therefore unwarranted.

See United States Fidelity & G. Co. v. Oklahoma, supra; Sawyer v. Piper, supra; Zucht v. King, supra; Equitable Life Assurance Society v. Brown, supra; Rice v. Sioux City Cemetery, supra.

Finally, the petitioner's claim that it was error for the trial court to deny him the right to cross examine witness Moore as to pending charges is totally devoid of merit and frivolous, and clearly does not present a federal question that will warrant the exercise of this Court's jurisdiction. Indeed, the petitioner's claim is patently refuted by the redord of the proceedings.

Before commencing his cross examination of Arthur Moore, defense counsel asked the court if he could go into all the pending charges against Mr. Moore. The court replied:

> I will permit you to ask him if there are any pending charges against him. I will let him answer that question and if he says he doesn't know I am not going to permit further examination. I am making the same ruling I made before. (TR.49)

During the cross examination of Moore, petitioner's counsel was indeed allowed to question the witness as to pending charges and charges that had been dropped against him, as evidenced by the following colloquy :

In the present case, the court complied with the rule. Defendant was allowed to cross-examine the witness concerning his current employment, his lack of past employment, his previous convictions, prior addresses and the current charges pending against him. Defendant's point simply urges that he should have been allowed a more extensive cross-examination. We hold that the extent of the cross-examination was adequate to inform the jury fully of the history of the witness and the fact that he had a pending charge against him, the trial of which had been delayed possibly in order to secure his testimony for the State at defendant's trial. The refusal of the trial court, after the facts were revealed, to allow defendant's counsel to exhaust the subject to his own satisfaction did not deprive the defendant of a fair trial. Cf. Ray v. State, 262 So. 2d 475 (Fla. 3d DCA 1972).

Defendant's claim that he was prejudiced by the nondisclosure of the present address of the paid informer witness has been disposed of adversely to the defendant in Crespo v. State,____So. 2d____(Fla. 3d DCA 1977), case no. 76-634, released April 5, 1977.

Defendant's point claiming error upon the court's failure to grant a mistrial because of a claimed improper comment by the prosecuting attorney during closing argument does not present reversible error. During closing argument, the prosecutor stated:

* * * * * *

> "I urge you to send him a message, to let him know you just can't go around the City of Key West, and County of Monroe, and peddle cocaine, or that if you do, you have to be prepared to face the consequences."

The remark was improper because it was not a comment upon the evidence before the jury. See Frenette v. State, 158 Fla. 675, 29 So. 2d 869 (1947). Defendant immediately moved for a mistrial. No curative instruction was sought. The question remains: Was the remark so prejudicial as to constitute the denial of the motion for mistrial reversible error? We hold that it was not of such a nature so as to poison the minds of the jurors or to prejudice them so that a fair and impartial verdict could not be rendered. See Johnsen v. State, 332 So. 2d 69 (Fla. 1976). Cf. Wingate v. State, 232 So. 2d 44 (Fla. 3d DCA 1970).

Accordingly, the judgment and sentence are affirmed.